The Central Law Journal.

ST. LOUIS, MAY 29, 1885.

JAMES O. BROADHEAD, FIRST PRESIDENT OF THE AMERICAN BAR ASSOCIATION.

We offer no apology to our readers for presenting to them this week an excellent likeness of the first president of the American Bar Association; a body whose exertions, though necessarily proceeding slowly, are destined to have a marked influence in elevating and strengthening the great and powerful profession of the law, which already numbers within its ranks, in the United States, seventy thousand men, and in unifying and simplifying the laws of our country. That body was organized at Saratoga, New York, in the summer of 1878, by a number of distinguished lawyers, among them William M. Evarts, Benjamin H. Bristow and Philemon Bliss. James O. Broadhead, of Missouri, received the honor of being chosen its first president. The Attorney-General of the United States is the honorary head of the American Bar, but, as this officer is often chosen for political reasons rather than out of deference to superior legal attainments, we doubt whether the presidency of the American Bar Association ought not to be regarded as the higher honor, and whether the incumbent of this office, for the time being, ought not to be regarded as the leader of the American Bar. During the seven years of its existence it has not once failed to be- stow this annual honor upon some lawyer dis tinguished in the profession for learning, ability and integrity.

James Overton Broadhead was born in Albemarle county, Virginia, on May 29, 1819. His father, Achilles Broadhead, was a substantial farmer, had been a captain in the war of 1812, and had been for many years held the office of county surveyor. He has two brothers living, Garland C., the well known geologist, and William F., a well known lawyer of Missouri. At the age of 16 he entered the University of Virginia, supporting himself wholly by his own efforts. At the close of this year he engaged as teacher of a private school near Baltimore. In 1837 he went to St. Charles county, Missouri, where his father had previously moved.

From 1838 to 1841, he was employed as tutor in family of Hon. Edward Bates, then of St. Charles County and while teaching there, he also studied law under the instruction of Mr. Bates. In 1842, he was licensed to practice law by Judge Ezra Hunt, of Bowling Green, Pike County, Missouri; and, selecting that place as his home, he commenced the practice of his profession, practicing in the circuit which embraced the counties of St. Charles, Lincoln, Pike, Ralls, Montgomery and Warren. In 1845 he was elected a delegate to the State constitutional convention from the Second Senatorial District. In 1847 he was elected to the Legislature as a whig. From 1851 to 1855 was State Senator. While living in Pike County, he was married at the age of twenty-six. In 1859 he moved to St. Louis, and soon after formed a partnership in the practice of the law with Fidelio C. Sharp, under the firm name of Sharp & Broadhead, which partnership continued until the death of Mr. Sharp in 1875.

He took an active part in saving Missouri to the Union. At the suggestion of Hon. Francis P. Blair, he was made a member of the "Committee of Safety," which was organized on February 1, 1861, for the purpose of resisting any overt acts of the Secessionists. This committee was composed of O. D. Filley, Samuel T. Glover, John How, J. J. Witzig and James O. Broadhead. He was member of the Missouri State Convention of 1861,

and chairman of the committee whose report was adopted, declaring vacant the offices of Governor, Lieutenant-Governor, Secretary of State, and Treasurer. During the same year, he was appointed United States District Attorney for the Eastern District of Missouri, and resigned a few months later to become Provost Marshal General with the rank of colonel for the Department embracing Missouri, Arkansas, Kansas, the Indian Territory, and Southern Iowa. He was a member of the Constitutional Convention of 1875, which framed the present Constitution of Missouri, which created the St. Louis Court of Appeals, and gave to the City of St. Louis a charter framed by its own citizens, amendable only by them, and free from legislative tinkering. He was also a member of the Board of Thirteen Freeholders which drew this admirable charter. The next year he was retained by the government as special counsel in the trials of the whisky ring conspirators. He was put in nomination for the presidency before the Democratic Convention which nominated Mr. Tilden, and was voted for on a number of ballots, receiving a majority of the votes of the Missouri delegation. In 1878 he received what we insist was the crowning honor of his life, by being chosen President of the American Bar Association. In 1882 he was elected to the 48th Congress on the Democratic ticket, and was a member of the Judiciary Committee. He has lately been appointed Commissioner for the United States in the matter of the French Spoliation Claims.

Col. Broadhead is still engaged in the active practice of his profession. In 1878 he was a member of the firm of Broadhead, Slayback & Haeussler, composed of himself, the late Alonzo W. Slayback, Herman A. Haeussler & Charles S. Broadhead, son of Col. Broadhead. This firm was dissolved in the fall of 1882, by the lamentable death of Col. Slayback, since which time the firm has been Broadhead & Haeussler, composed of the survivors.

Col. Broadhead has at all times taken an active part in matters affecting the public good in the community in which he has lived. Though generally identified with some political party, he has in all public matters been able to rise above mere party prejudice and party dictation. He has given the right hand of fellowship to many a young man while endeavoring by honorable dealing and hard work to get a foothold in life; at the same time extending no favors to those who have endeavored to get into position on the strength of ancestral reputation, or by waiting for some turn of luck or good fortune.

CURRENT EVENTS.

NEWSPAPER ARTISTS.—A St. Louis newspaper sent an "artist" so-called, to Austin, Texas, to illustrate the legislature. The first batch of illustrations appeared, and in due time the paper containing them arrived in Austin. Now the artist is in the hospital with several knife wounds in his body, and one of the members of the legislature is in jail. These are the places where journalistic "enterprise" always brings up when it is tried on a Southern man.—*Chicago Herald.* The St. Louis concern should have employed some one able, like the *Gazette's* legislative artist, to grasp high art and make the old masters ashamed of themselves. —*Arkansas Gazette.*

The *Gazette's* legislative portraits are all of them excellent; but they have the fault of monotony, they all look alike. The pictures furnished by the CENTRAL LAW JOURNAL'S artist are the only one's which are really trustworthy, albeit the printer may now and then get a little too much ink on them, so as to make them look like the Ameer of Afghanistan, like El Mahdi, or like a Central American revolutionist. Moreover our biographies are none of your patent ready-made affairs, gotten up in New York, and distributed to the country press. They are "official;" and like the official reports of battles (we do not refer to Shiloh or to the Pendjeh affair) may be held to "import absolute verity."

TEXAS COURT REPORTER. — We have received the first number of a publication bearing this name. It is edited by W. B. Dunham, Esq., and published at Austin by Eugene Von Boeckman & Co. It is printed on good book paper of ordinary law book size, and presents an excellent appearance. As its name indicates, it is devoted chiefly to the publishing of the decisions of the Texas Supreme Court and Court of Appeals, together

with such Federal decisions as bear upon Texas jurisprudence. It presents a first class appearance. We like the head-notes of the cases, and shall take the liberty of using them occasionally in our digest of recent decisions. Texas ought to support one good publication of this kind, but she cannot support more than one. Competition will stimulate improvement, and in this regard, as well as in regard to what is due to its obvious merits, this publication will, we think, be welcomed by the bench and bar of that State. We hope the learned editor will find time to revise the citations of cases in the body of opinions. We are afraid he has not attempted this in the present number. We see 39 Cal. cited on page 3, as 39*th* Cal. We see Heiskell cited Hirskell on page 7 and 9 Vesey is cited as "9 Vesey Rep." The word "Rep." is unnecessary, and Vesey is never mistaken when it is abbreviated, as it usually is, "*Ves.*" *Texas* is sometimes printed in full, and sometimes abbreviated into "Tex." The proper punctuation is not always used in the citations. In most of the cases the name of the judge writing the opinion is placed at the commencement thereof; but in some cases, toward the end, the word "OPINION" is placed at the head, and the name of the judge at the foot of the opinion. We see that they have in Texas the abominable expedient of a commission of appeal, whose opinions are "adopted" by the Supreme Court. Such makeshifts, dictated by legislative parsimony, cannot fail to be permanently prejudicial to the jurisprudence of any State.

ERRATA.—In the opinion of the Supreme Court of Kansas in the case of *Kansas City, etc. R. Co. v. Riley*, published in a former number of this journal,[1] there occurs in the first line of the last paragraph in the first column, the following statement: "The rule of the common law seems to be in force in Pennsylvania, Iowa, Illinois, California, Louisiana, and is referred to with approval in Ohio." Our types should have said, "The rule of the *civil* law," etc. Every man in the course of his life must eat his peck of dirt, and every printing office must make its quota of mistakes. They are incident to all kinds of work; but in this instance we find that the mistake was in the copy sent to us. We wish we could say as much of the paragraph in another issue of this journal, entitled "The Tail Wagging the Dog."[2] That entire paragraph, except the introductory sentence, should have been credited to our learned and refined contemporary, the *Albany Law Journal;* but the ingenuity of some one transferred the quotation marks from the end of the paragraph to the end of the first sentence, thus leaving *us* to answer personally for the rather strong comparison which was drawn between the majority and minority opinion of the Supreme Court of the United States in the Virginia Coupon Cases. We live in the Wild West, in the land of Dr. Carver and Buffalo Bill. Missouri is a buffalo range, and St. Louis is a rebel colony. We wear our pants inside our boots, carry a six shooter in each boot leg, and also one on each side at the belt. We pick our teeth after each meal with an Arkansaw toothpick, and furnish the said tooth pick with a resting place between meals adown our spinal column just inside our shirt collar. We also have a lingering affection for State rights, and do not agree with the conclusion of the majority of the Supreme Court that a jurisdiction exists in the Federal Courts to compel the States of the Union to perform their contracts. But we have not reached that rip-roaring, rollicking disregard of consequences—that obliviousness to the *dulce et decorum* of legal journalism, which will enable us to apply such a striking metaphor to the two opposing opinions emenating from that august body. If we were to do so, the boys of the *Columbia Jurist* would take us to task, and would tell us to have a little "sweet reasonableness." The learned editor of the *Montreal Legal News*, whose name trembles under the weight of the two additions of LL,D. and D. C. L., having finished the half hour's task performed each week of editing his little sheet and reading the proof thereof, would empale us on his caustic pen. He evidently has much time to sit on the fence and watch his neighbors. His great mind discovered in one of our monthly indexes, found on our outside cover, the word *volenti* by an error of proof-reading spelled

[1] 20 C. L. J., 373.

[2] 20 C. L. J., 400.

valenti. It also discovered, after laborious search and long reading, that in one of the leading articles of the *American Law Review*, a plural noun had a singular verb. Each of these discoveries, in the dearth of anything more interesting with which to regale his small circle of readers, afforded him the material for a half-column editorial. Poor old Canada.

NOTES OF RECENT DECISIONS.

REMOVAL OF CAUSES—WHO MAY OBJECT TO JURISDICTION—REMOVAL AFTER MISTRIAL.—We have been requested by a subscriber to print the decision of the Supreme Court of the United States in *Ayers v. Watson*.[3] We find ourselves unable to do so on account of its length; but we shall here give that portion of it concerning which our subscriber makes inquiry, which rules the two following points: 1. That after the removal of a cause to a Federal court, objection to the jurisdiction of the latter court will not be listened to, if made by the party at whose instance the removal took place, unless the want of jurisdiction is fundamental. 2. That the objection that the removal may be had after a mistrial in the State court is not fundamental, and hence cannot be made by such party. "The first reason," said Mr. Justice Bradley, "has no foundation in fact. The plaintiff's petition demanded the recovery of the land and $500 damages. This was certainly a demand for more than $500, unless it can be supposed that the land itself was worth nothing at all, which will hardly be presumed. The second reason is more serious. The application for removal was beyond question too late according to the act of 1875, though not so under the act of 1866 as codified in Rev. Stat. § 639, cl. 2, which allows the petition for removal to be filed 'at any time before the trial or final hearing of the cause.' This language has been held to apply to the last and final hearing. A mistrial by disagreement of the jury did not take away the right of removal.[4] But we have held that this clause of § 639 was superseded and repealed by the act of 1875.[5] We are compelled, therefore, to examine the effect of the act of 1875 upon the jurisdiction of the court when the application is made at a later period of time than is allowed by that act.

"By § 2 of the act of 1875 any suit of a civil nature, at law or in equity, brought in a State court, where the matter in dispute exceeds the value of $500, and arising under the Constitution or laws of the United States, or in which the United States is plaintiff, or in which there is a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district; and when in any such suit there is a controversy wholly between citizens of different States, which can be fully determined as between them, one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the Circuit Court of the United States for the proper district. This is the fundamental section, based on the constitutional grant of judicial power. The succeeding sections relate to the forms of proceeding to effect the desired removal.

"By § 3 it is provided that a petition must be filed in the State court before or at the term at which the cause can be first tried, and before the trial thereof, for the removal of the suit into the circuit court, and with such petition a bond, with condition, as prescribed in the act. The second section defines the *cases in which* a removal may be made; the third prescribes the mode of obtaining it, and the time within which it should be applied for. In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable, and must be shown by the record; the directions of the third, though obligatory, may, to a certain extent, be waived. Diverse State citizenship of the parties, or some other juris-

[3] 5 U. S. C. Repr. 641.

[4] See Insurance Co. v. Dunn, 19 Wall. 214; Stevenson v. Williams, Id. 572; Vannevar v. Bryant, 21 Wall. 41; Railroad Co. v. McKinley, 99 U. S. 147.

[5] Hyde v. Ruble, 104 U. S. 407, 410; King v. Cornell, 106 U. S. 395; s. c., 1 Sup. Ct. Rep. 312; Holland v. Chambers, 110 U. S. 59; s. c., 3 Sup. Ct. Rep. 427.

dictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed.[6] Application in due time, and the proffer of a proper bond, as required in the third section, are also essential if insisted on, but, according to the ordinary principles which govern such cases, may be waived, either expressly or by implication. We see no reason, for example, why the other party may not waive the required bond, or any informalities in it, or informalities in the petition, provided it states the jurisdictional facts; and if these are not properly stated, there is no good reason why an amendment should not be allowed, so that they may be properly stated. So, as it seems to us, there is no good reason why the other party may not also waive the objection as to the time within which the application for removal is made. It does not belong to the essence of the thing; it is not, in its nature, a jurisdictional matter, but a mere rule of limitation. In some of the older cases the word 'jurisdiction' is often used somewhat loosely, and no doubt cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the court. We do not so regard it. And since the removal was effected at the instance of the party who now makes the objection, we think that he is estopped. In Railroad Co. v. Koontz,[7] we held that where the State court disregarded a petition for removal properly made, and the plaintiff continued to prosecute the suit therein, he would be deemed to have waived any objection to the delay of the defendant in entering the cause in the Circuit Court of the United States until the decision of the State court is reversed. We do not think that this assignment of error is well taken."

PUBLIC SCHOOLS — REASONABLE RULES — SUSPENSION AND FLOGGING.— Two decisions have recently come to hand on the power to establish and enforce reasonable rules for the government of common schools. The first is the decision of the Supreme Court of Missouri in the case of *Derkins v. Goss*, stated in our "digest" last week.[8] This case related to the power of the teacher, and holds that a teacher has power to make a rule, and to enforce it by flogging, prohibiting the boys from swearing, quarrelling or fighting on their way home from school, and before the parental authority over them has been resumed. The second is the decision of the Supreme Court of Wisconsin in *State, ex rel.* v. *Board of Education of Fond du Lac*.[9] This case relates to the power of a board of education of a city, and holds that a regulation made by such a board that each scholar, when returning to school after recess, shall bring into the schoolroom a stick of wood for the fire, is not "needful for the government of the schools," within the meaning of the statute clothing the board with its powers. Cole, C. J., says: "School boards and boards of education have important duties to discharge, and we have no disposition, as our decisions show,[10] to circumscribe their powers in too narrow a compass. The statute clothes them with power to make all needful rules for the government of the schools established within their respective jurisdiction, and to suspend any pupil from the privileges of the school for noncompliance with the rules established by them, or by the teacher with their consent.[11] While from the necessity of the case much discretion must be left to these boards as to the nature of the rules which are prescribed, yet it cannot fairly be claimed that the boards are uncontrolled in the exercise of their discretion and judgment upon the subject. The rules and regulations made must be reasonable and proper, or, in the language of the statute, '*needful*,' for the government, good order, and efficiency of the schools—such as will best advance the pupils in their studies, tend to their education and mental improvement, and promote their interest and welfare. But the rules and regulations must relate to these objects. The boards are not at liberty to adopt rules relating to other subjects ac-

[6] Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379; S. C., 4 Sup. Ct. Rep. 510.
[7] 104 U. S. 17.

[8] 20 C. L. J. 419, pl. 21.
[9] 23 N. W. Rep. 102.
[10] Morrow v. Wood, 35 Wis. 59; State v. Burton, 45 Wis. 150.
[11] § 439, Rev. St. Wis. subc. 15, (§ 10, c. 152, Wis. Laws, 1883, p. 426).

cording to their humor or fancy, and make a disobedience of such a rule by a pupil, cause for his suspension or expulsion. We therefore think the rule or regulation requiring the pupil to bring up wood for use in the schoolroom was one which the board had no right to make and enforce."

FALSE IMPRISONMENT—ARRESTS AT THE REQUEST OF OFFICIALS IN OTHER STATES.—A frequent practice of the police of American cities is to arrest persons supposed to have committed crime in other States, on letters or telegrams, from sheriffs, marshals, or chiefs of police in such other States, before any warrant has been sworn out in such other State charging the person with the commission of the crime. Persons thus arrested are put in a prison called in police slang the "hold-over," and are held for such time as the police deem discreet, or until a writ of *habeas corpus* comes, to await formal proceedings of extradition. When necessary to hold the prisoner, a fictitious charge is sometimes trumped up against him, such as vagrancy, or the like. The exercise of such a power is undoubtedly beneficial to society in many cases; but innocent men who have had the misfortune to fall under police suspicion, have sometimes felt its oppressive force. It is a power which police officials exercise at their peril, as the recent decision of the Supreme Court of Michigan in *Malcomson* v. *Scott*[12] quite clearly shows. A person living at Alpena, Michigan, was there arrested by the marshal of the town and detained by the sheriff of the county for two or three days, on a letter and a subsequent telegram, purporting to come from the chief of police of Philadelphia, stating that he had absconded with the funds of a certain benevolent society, of which he was a member, and requesting his detention. The telegram promised to send an officer and a requisition for him at an early date. But neither the letter nor the telegram showed that any prosecution had been commenced against him in Pennsylvania, nor whether the offense charged was a crime under the laws of Pennsylvania, nor at what date it was committed. It was held that the sheriff was liable for damages for a false imprisonment. Campbell, J., said: "The habit, which is by a very singular abuse of language called official courtesy, of making illegal arrests in one jurisdiction in the hope that similar violations of law may be reciprocated, is one which cannot be tolerated. The law places private liberty at a much higher value than official favors; and violations of law by those who are appointed to protect, instead of destroy private security, deserve no favor. Fundamental rules of constitutional immunity cannot be relaxed. * * * The extradition of criminals who are claimed to be fugitives from other States, is governed entirely by the constitution and laws of the United States. No State can deal with other States, under the express terms of the constitution, without the approval of Congress, and what the State cannot do its policemen cannot do. An arrest here without compliance with the United States laws cannot be maintained. Michigan cannot treat foreign offenses as domestic, and there is nothing in our statutes which contemplates an arrest without warrant for purposes of extradition. Under the Constitution and Acts of Congress it is for the governor of the one State to determine whether he desires extradition, and for the governor of the other to decide whether he will grant it. Congress will not allow the demand to be made until the offender has either been indicted or otherwise complained of in the regular course of justice. There can be no demand before complaint.[13] Our statute in aid of such proceedings only allows an arrest where a complaint is made on oath, setting forth such matters 'as are necessary to bring the case within the provisions of law,' and on a full showing the person may be recognized to appear again before the magistrate at some future day, 'allowing a reasonable time to obtain the warrant of the governor,' and in default of bail there may be a commitment.[14] But the statute further requires that the complainant shall be liable for costs and charges, and for the weekly support of the prisoner, and that the jailor may discharge him on default thereof. The arrest, therefore, cannot be justified under

[12] 23 N. W. Rep. 166.

[13] Rev. St. U. S. § 5278.

[14] How. Mich. St. §§ 9623, 9624–9626.

this act, and the order of the commissioner was in clear violation of it, and could justify no further holding."

THE LATE DECISIONS ON THE KANSAS LIQUOR LAW.

An foreigner reading the decisions of American courts on questions of constitutional law and generalizing what he finds, would come to the conclusion that constitutional law in America is a kind of law devised by the vicious, unruly and disorderly minority, to prevent the virtuous, orderly and peace-loving majority from punishing crime and preserving the peace of society. No better illustration of this could be given than two recent decisions in Kansas, one by Judge Crozier, of the Kansas District Court, at Leavenworth, and the other by Judge Foster, of the United States District Court for the District of Kansas. The question related to the constitutionality of the eighth section of a statute of Kansas enacted, March 7, 1885, for the enforcement of the constitutional and statutory law of the State against the traffic in intoxicating liquors. The text of the section is not before us; but, as stated in the opinion of Judge Foster, elsewhere printed, its essential provision is that, it clothes the county attorney with power to summon persons before him to be interrogated as to whether they know of any violation of the Liquor Law, and gives him power, in case they refuse to answer his questions, to imprison them for contempt. Judge Crozier holds that the law is unconstitutional, on what ground we are unable to state, because we have not seen his opinion.[1] Judge Foster also holds that it is unconstitutional, in an opinion which we print on another page, on the ground that an imprisonment for contempt under such a law is an imprisonment without due process of law, and therefore contrary to the inhibition of the Fourteenth Amendment to the Federal Constitution. Judge Foster is a learned and temperate-minded judge, and writes a good opinion; but we apprehend that this opinion will be read and re-read in vain for any solid ground for the conclusion that the Kansas statute is not "due process of law." The only reason for holding that it is not due process of law which we can extract from his opinion, is that it is novel and unusual to give to an officer, whose vocation is to prosecute, and for the purpose of enabling him to prosecute, those inquisatorial powers which are usually confided to grand juries. This, it is perceived, is all that the statute does. Thegrand jury cannot, indeed, imprison a recusant witness for refusing to answer questions; but the court can. The conclusion of Judge Foster cannot, therefore, be vindicated, unless the principle is to be laid down that an act of the legislature, which vests in one officer powers which have hitherto been vested in another officer, and which have been exercised without question from time immemorial, is not due process of law. We think that no lawyer will go so far as to claim this. Judge Foster disclaims it in his argument, but we submit that he necessarily asserts it in his conclusion. It would not be contrary to the Fourteenth Amendment for a State to abolish grand juries altogether, and to lodge all their inquisatorial powers in its prosecuting attorneys; and the Supreme Court of the United States has lately so held.[2] This reason being disposed of, we can discover no other reason in Judge Foster's opinion for the conclusion at which he arrives, than the impression of a very learned and excellent judge that the inquisatorial power thus confided to a prosecuting officer might be oppressively exercised. This can be said of all governmental power, ministerial or judicial: it must be lodged somewhere, and there must be a finality somewhere, and the tribunal which must finally decide may decide unlawfully, and the enforcement of its decision may be oppressive. But this result is not to be presumed, and does not afford a reason for refusing to clothe any officer or magistracy with necessary governmental powers. The gist of Judge Foster's opinion therefore is, that the Kansas statute is unreasonable; though, of course, he does not put it upon this ground, and this calls up the pertinent question, which the American people must face and solve,

[1] Since the above has been printed, the decision of Judge Crozier has come to hand, and will be given by us next week.

[2] Hurtado v. People of California, 110 U. S. 516.

whether the Federal courts are judges of the reasonableness of the acts of the State legislatures. Some of them are of the opinion that they are.

Judge Foster is too learned and discreet a judge to assert the possession of such a jurisdiction; but other Federal District judges do assert it, and do exercise it. Fortunately their decisions in these cases, when proceeding under the writ of *habeas corpus* are no longer final. The people of the States now have an appeal to the Supreme Court of the United States, for what it is worth.[3] An appeal on such a queston to a tribunal, a majority of whose judges assume, in the face of the 11th Amendment to the Constitution, to compel the States, by compulsory process emanating from the Federal Courts and directed to the ministerial officers of the States, to perform specifically their contracts, is not worth what it would be worth if more of the judges of the court were sound constitutional lawyers; and it is safe to predict that it is not worth as much now as it will be worth hereafter. But the recent decision of that court in Robb v. Connolly,[4] shows that it is worth something.

But we cannot see upon what ground the statute could be pronounced unreasonable as matter of law. It is not stated that it requires a witness so summoned to give evidence which would criminate himself, or to disclose confidential communications, or even to give evidence which would not be admissible on the trial of an indictment or information. How a witness can be oppressed by being compelled to tell the truth, or by being compelled to tell it by a county attorney, instead of by a court having a grand jury in session; or how a statute becomes dangerous to society, because it affords the means of discovering and punishing crime, are matters about which the public still wait for information.

[3] The *Topeka Commonwealth* is mistaken in its supposition, that the bill granting an appeal did not become a law. We have a letter of Judge Poland, the father of the bill, written after the adjournment of Congress, stating that it passed the Senate and became a law.

[4] 4 Sup. Ct. Repr. 544.

CONTRACTS BY LETTER OR TELEGRAPH.

HAAS v. MYERS.*

Supreme Court of Illinois, Ottawa, Nov. 17, 1884.

Rule where Dispatch of Acceptance does not Reach Destination.—A contract by letter is completed the instant the letter accepting the offer is mailed, and is valid and binding whether the letter of acceptance is received or not. But where anything else is left to be settled in respect of an offer by mail or telegraph, the acceptance of the offer by telegraphing will not complete the contract where the dispatch does not reach its destination.

Appeal from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook County; the Hon. George Gardner, Judge, presiding.

This was a bill in equity, filed by Andrew Haas, to have himself declared a partner with Alfred Myers in respect to a certain lot of cattle, and for an accounting.

The material facts appearing are, that during 1882, Haas business was buying cattle, and shipping them to sell in the Chicago market; that during the same time, Alfred and Benjamin Myers, and William H. and James E. Martin, were engaged in the same business,—Alfred and Benjamin Myers as partners under the firm name of A. Myers & Bro., and the Martins as partners under the name of Martin & Bro., and during that time the Myers and Martins were jointly engaged in the same business. Prior to September 20, 1882, Haas and Alfred Myers had, respectively, been negotiating for the purchase of a lot of cattle in Montana, known as the "Murphy herd," and on that day, Alfred Myers being about to visit the range where the cattle were kept, the two agreed that Myers would ascertain at what price the cattle could be purchased, and buy them if he saw fit; that in case he bought, he should telegraph Haas at Chicago, indicating the price per head; that thereupon Haas was to reply by telegraph, at once and without delay, saying "Yes," or "No;" that if he replied "yes," Myers, on receipt of the telegram, was to telegraph back to Haas the estimated amount required to pay for one-third interest in the cattle, which amount Haas was at once to place to the credit of A. Myers & Bro., at the First National Bank of Chicago, in order that Myers & Bro., could immediately draw for the same to pay toward the cattle, and Haas was to cause the bank to telegraph such credit to A. Myers & Bro., at Billings, Montana, which being done, Haas was to have one-third interest in the cattle. Myers proceeded to the range, and on September 26 made a trade with Joseph Murphy for the cattle, at $45 per head all around, the cattle to be taken at the ranch, Myers paying $5,000 cash down as earnest money to bind the bargain and agreeing to pay $15,000 more before the cat-

* S. C., 111 Ill. 421 (adv. sheets).

tle were moved, and the balance of the purchase price at the time of the final shipment of the cattle at Billings, Montana, the purchase price being about $55,000, and agreeing also that the cattle should be moved within thirty days. The trade was to be concluded at Billings. Murphy and Myers proceeded to Billings, arriving there on the 28th of September, and on the same day, Myers telegraphed to Haas at Chicago, as follows:

"Do you want Murphy's forty-five, at ranch? Answer. A. MYERS."

At once on receiving this, and on September 29, Haas telegraphed back:

"Yes, I will take third interest. Will leave for Billings to-night."

This dispatch never reached Myers or Billings. Later, and within an hour, Haas sent a further dispatch:

"If Murphy cattle are good, there is no danger in buying them. Davis-Hauser cattle sold close to five cents through. A. HAAS."

This dispatch was received by Myers on October 2. No other dispatch or information than this last one being received from Haas by Myers, though Myers inquired frequently at the telegraph office for any reply from Haas, and in the meantime William H. Martin, one of the partners, having joined Myers and Murphy at Billings, on the 2d day of October, the contract with Murphy was concluded, and Myers and Martin themselves raised and paid the whole $15,000, Murphy having refused to wait any longer, and declared that if it were not paid on that day, he would refund the $5,000 already paid, and "call the trade off." The next day (October 3) Haas appeared at Billings and claimed a third interest in the contract, insisting that he had sent to Myers the first above mentioned dispatch. Myers informed Haas that he had never received any such telegram, but had received the one last named, about there being "no danger in buying" the cattle, etc., and that only, and that he and Martin had raised and paid the necessary funds the day before, and that he (Haas) was entitled to no interest in the purchase. Haas and Myers went together to the telegraph offices at Billings, to ascertain whether or not such dispatch (the one first named) had been received there. It was ascertained that no such dispatch had been received there, and Myers reiterated his refusal to permit Haas to have any interest in the cattle, notwithstanding Haas stated that he was ready to pay his share, and to do what might be required of him. Myers and his associates shipped the cattle to Chicago, and made a net profit thereon of $19,100. That amount remained in the hands of Adams & Burke, commission merchants at Chicago.

This bill was filed October 31, 1882, praying that Haas might be declared to be a partner to the extent of one-third interest in the purchase of the cattle; that an accounting might be had between the partners, and a decree granted the complainant for the one-third share of the net profits, and an injunction restraining the payment over of the money by Adams & Burke. A temporary injunction was granted, and afterwards, on the final hearing, the injunction was dissolved, and the bill dismissed. On appeal to the Appellate Court for the First District the decree was affirmed, and a further appeal taken to this court.

Dupee, Judah & Willard, for the appellants; *Judd & Whitehouse*, and *William Ritchie* for the appellees.

SHELDON, J. delivered the opinion of the court:

It is insisted upon, on the part of the appellant, that the partnership here claimed was actually formed; that if there was not a literal there was a substantial performance by Haas of the conditions of the contract; that he did all that he could,—telegraphed, as he had agreed, his acceptance,—and could do no more until action by Myers; that not putting up his share of the money in the manner provided, was because of the failure of Myers to advise him by telegram of the amount necessary; that the telegraphic acceptance sent by Haas, although not received, had all the legal effect it could have had if it had been received by Myers. In support of this last proposition the rule governing the negotiation of contracts by correspondence through the mail is appealed to, and it is contended the same rule applies in the negotiation of a contract by telegraph,—that rule being, that where parties undertake to contract by letter, and one party makes a proposal by letter, and the other by letter accepts and posts his acceptance, the minds of the parties have met, and from the instant of mailing the acceptance the contract is a valid and binding one. See Household Fire Ins. Co. v. Grant, L. R. 4 Exch. Div. 216; Taylor v. Merchants' Fire Ins. Co., 9 How. 390; Moctier v. Frith, 6 Wend. 103; Hallock v. Insurance Co. 2 Dutch. 268; Minnesota Oil Co. v. Collier Lead Co., 4 Dill. 431; Abbott v. Shepard, 48 N. H. 14; Trevor v. Wood, 36 N. Y. 307; Pomeroy on Contracts, 95, and cases there cited. Although there be contrary authority that a contract made by mutual letters is not complete until the letter accepting the offer has been received by the person making the offer (see Lewis v. Browning, 130 Mass. 175,) we regard the weight of authority to be in favor of the rule as first above stated. A distinction has been taken, that though in general such a contract takes effect from the time of acceptance, and not from the subsequent notification of it, yet the offerer may not be bound by the fact that the letter of acceptance had been put in the post-office, if the letter never reached its destination. The preponderance of authority does not appear to sustain this distinction, but to hold that the mailing of the letter of acceptance completes the contract, whether the letter reaches its destination or not. In the above cases, in 4 Dill. and 36 N. Y., it was held that the same rule applied in the case of correspondence by telegraph as in the case of correspondence through the mail. Whether the rule does so fully apply in the former

case we do not find it necessary now to determine, as, conceding that it does, we do not consider that the rule has application to the facts of the present case. We think that under the arrangement entered into between the parties, the formation of the contract was made dependent upon the actual communication by telegraph, to Myers, of Haas' acceptance. This is not the case of an offer made, and where the simple acceptance completes the contract between the parties. Haas' reply, if it had reached Myers, was not the conclusion of the bargain. Considerable remained to be done afterward, on both sides. Myers, after receipt of the dispatch, was to telegraph again, giving the amount to be deposited. Haas was to deposit this amount. The bank was then to telegraph the credit to Myers, so as to make it available for the purchase of the cattle.

We think, too, the terms of the contract imply that Haas' answer that he would take a third interest, should actually reach Myers, and within a very short time, or the contract would not be binding. A large purchase was involved, requiring the payment of a considerable amount of money. Promptness was necessary, and it was important that Haas should furnish his share of the purchase money necessary to complete the purchase. It was uncertain whether the cattle would be purchased by Myers, and if so, whether Haas would want a third interest in them at the price they could be purchased for. It was therefore arranged that if Myers purchased, he should telegraph Haas the price per head, and if Haas wanted a third interest at the price, he should, immediately after receiving Myers' dispatch, answer back, by telegraph, "Yes" or "No." If the answer was "yes," then Myers would immediately inform Haas, by telegraph, of the amount of money that would be required to be placed to the credit of A. Myers & Bro. at the First National Bank in Chicago, in order to secure a third interest in the purchase of the cattle. Now, Haas never did advise Myers, by telegraph, that he would take an interest. No such telegram ever came to Billings—the place of destination. Manifestly, delivering the message containing an affirmative reply to the telegraph office for transmission, did not answer the purpose. Myers could not act upon that mere delivery. He must have knowledge. Haas was to telegraph, and if the answer was "yes," Myers was to telegraph back the amount of money required; but he could not telegraph back what was the amount of money needed until he was informed of Haas' desire to take a third interest—until he had received the telegram "yes." This shows that it was in the contemplation of the parties that this telegram should not merely have been deposited for transmission, but that it should have been transmitted and been received before there could arise between the parties any completed contract. It was essential that notification of Haas' desire to have a part in the purchase should have come to Myers, to enable him to inform Haas of the amount of money needed from him, and so enable Haas to perform on his part by furnishing his share of the purchase money.

But further, within an hour after depositing in the telegraph office, for transmission, his telegram of acceptance—"yes"—Haas sends this misleading dispatch: "If Murphy cattle are good, there is no danger in buying them," and this telegram was received by Myers October 2, and was the only one received by him, or that ever came to Billings in answer to his inquiry if Haas wanted an interest in the purchase. What was Myers to understand from this? If Haas wanted an interest in the cattle, the telegram agreed upon between him and Myers by which he should signify that wish, was the word "yes." This was not such a telegram, and it did not express any idea that Haas wanted or would take an interest in the cattle. It stated merely that upon a certain hypothesis—if the Murphy cattle are good—there is no danger in buying them. We think that Myers was justified in taking this dispatch sent by Haas, as an abandonment of all interest in the contract, or at least as denoting a want of consent on Haas' part to take an interest in the cattle, and a want of intention of completing the proposed contract in furnishing a part of the purchase money, and that Myers could not place further reliance thereon, but might well proceed in the completion of the purchase from Murphy, by raising himself, and with the assistance of Martin, the whole amount of the $15,000 required to be paid on that day to Murphy, and claim the purchase as being his own, to the exclusion of Haas from any share in it. This second telegraphic dispatch did not come within any arrangement made between Haas and Myers, but was Haas' own independent, voluntary act, and he alone is to blame for its misleading effect. The $15,000 which was to have been paid on moving the cattle from the ranch, Murphy was insisting must be paid on October 2, or that he would refund the $5000 paid, and declare the trade "off,"—that he would not wait any longer. Myers and Martin, after receipt of that dispatch, raised the money on that day, and paid it. To be sure, Haas appeared in person at Billings the next day, and offered to perform. This, we think, was too late. It would not be a substantial performance. It was essential that he should have performed before; that he should have contributed his share to the payment of the purchase money that was paid to Murphy; that he could not, after leading Myers to think that he did not want an interest in the purchase, and the latter and Martin raising and paying all the purchase money required, come in afterward, though only the next day, and then offer to pay his share of the money, and demand the right of participation in the purchase. To have then admitted Haas into the purchase would have been but a matter of favor with Myers—not of obligation.

We think the decree dissolving the injunction

and dismissing the bill was right, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

NOTE.—There can be no valid contract, unless all the parties thereto assent to the same thing in the same sense. Eads v. Carondelet, 42 Mo. 117; Falls Wire Manf. Co. v. Broderick, 12 Mo. App. 378. Therefore the acceptance of a proposition, coupled with a qualification or condition, is not such an acceptance as binds the sender of the proposition. Falls Wire Manf. Co. v. Broderick, *supra*. Thus, an offer to buy a horse "if warranted sound and quiet in harness, is not accepted by sending the animal with a warranty that it "is sound and quiet in *double* harness." Jordan v. Norton, 4 Mees. & W. 155. But a *request* contained in the letter of acceptance that the proposer do a certain thing, does not necessarily render the contract conditional. Stotesburg v. Massengale, 13 Mo. App. 221. Although the parties may have come to an understanding, yet if it appear that it was their intention that a formal contract should be executed before they should be bound, this intention must govern Bourne v. Shapleigh, 9 Mo. App. 64. But it is seen that the principal case concerns the rule which is to be applied where the proposer *does not know* that the proposal is accepted, that is, where the letter or dispatch accepting it does not reach the proposer. In their argument of the principal case, the following authorities were cited by the learned counsel for the appellees, as opposed to the view to which the court accedes, that where the contract is *by mail*, the minds of the parties are deemed to have met, by the mere fact of mailing an unconditional letter of acceptance to the proposer. 2 Langdell's Cases on Contracts, 993, 994; McCullough v. Eagle Ins. Co., 1 Pick. 278; Lewis v. Browning, 130 Mass. 175; Harris' Case, L. R. 7 Ch. App. 597; Finucan's Case, 20 L. T. (N. S.) 729; British Tel. Co. v. Colson, L. R. 6 Exch. 115; Hibb's Case, L. R. 4 Eq. 12; Reidpath's Case, L. R. 11 Eq. 86; Townsend's Case, L. R. 13 Eq. 153; Pellat's Case, L. R. 2 Ch. App. 527; Gunn's Case, L. R. 3 Ch. App. 40; Sahlgren's Case, L. R. 6 Id. 323.

DUE PROCESS OF LAW.

EX PARTE ZIBOLD.

U. S. District Court, District of Kansas, May 20, 1885.

An act of the legislature of a State, conferring upon a prosecuting attorney the power to summon persons as witnesses, to interrogate them touching their knowledge of violations of a law prohibiting and punishing the sale of intoxicating liquors, and to imprison them for contempt for refusing to answer such questions, authorizes imprisonment without due process of law, within the meaning of the inhibition of the Fourteenth Amendment to the Constitution of the United States, and is therefore void.

FOSTER, J., delivered the opinion of the court:

The petitioner in this case alleges that he is imprisoned and deprived of his liberty in violation of a provision of the Fourteenth Amendment to the Constitution of the United States. That amendment provides, among other things, that no State shall deprive any person of life, liberty or property without due process of law.

The Federal courts and judges are authorized, among other causes, to issue the writ of *habeas corpus* for a person in custody and imprisoned in violation of the constitution, or of a law or treaty of the United States. Rev. Stat. U. S. § 753. The jurisdiction of this court to issue the writ and hear the case depends upon the truth of the averments in the petition, and therefore, the jurisdiction of this court and the main question are so inseparably connected together, that the determination of one must determine the other.

It appears from the petition and the return to the writ that the petitioner is held in custody and imprisoned by the sheriff of Atchison county, by virtue of a commitment issued to him by the county attorney, committing the petitioner to the county jail, for refusing to obey a subpoena issued by said attorney, and refusing to be sworn and give testimony before him in proceedings under the 8th section of an act of the legislature of Kansas, approved March 7, 1885, being an act amendatory to the act prohibiting the manufacture and sale of intoxicating liquors, etc. It is admitted that the county attorney acted and proceeded in accordance with the provisions of the law; and the question is fairly presented whether a person imprisoned for refusing to appear or testify before the county attorney in such proceedings is restrained of his liberty without "due process of law," within the meaning of the Constitution of the United States.

The first matter of inquiry is the meaning of the term "due process of law." If it has no broader meaning than process prescribed by act of the legislature, it is the end of the case. But such a construction would render the constitutional guarantee mere nonsense, for it would then mean no State shall deprive a person of life, liberty or property, unless the State shall choose to do so. It has repeatedly and uniformly been adjudicated that the terms "due process of law" and "law of the land" have a broad and comprehensive meaning, and originated in that great bill of rights, Magna Charta, and operate as a restriction on each branch of civil government. (Murray's Lessee v. Land Company, 13th Howard, 272; Davidson v. New Orleans, 96 United States, 107; *Ex parte* Virginia, 100 United States, 346). In the last cited case the court speaking of these words in the constitution says: "They have referenee to the actions of a political body denominated a State, by whatever instruments, or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision therefore, must mean that no agency of a State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of a public position under a State government deprives another of property, life or liberty without

due process of law violates * * * the constitutional inhibition, and as he acts in the name and for the State and is clothed with the State's power, his act is that of the State. This must be so or the constitutional provision has no meaning.

These words in the constitution have been defined in various terms by different courts, but all the definitions tend to the same general idea. Mr. Justice Edwards has said in one case: "Due process of law undoubtedly means in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights." Westervelt v. Gregg, 12 N. Y. 209. Mr. Justice Johnson, of the Supreme Court of the United States, says: "As to the words from Magna Charta, incorporated in the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: That they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Bank of Columbia v. Oakley, 4 Wheat. 235. This definition has been several times approved by that court. United States v. Cruikshank, 92 U. S. 554; Hurtado v. California, 110 U. S. 527. Judge Cooley says: "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Cooley's Constitutional Limitations, 356; Wynehamer v. People, 13 N. Y. 432; Taylor v. Porter, 4 Hill, 145.

With this general principle established and the meaning of those words defined, the difficulty remains of applying the principle to any particular case. In the case of Hurtado v. California, *supra*, Mr. Justice Matthews, in a very learned and exhaustive opinion, speaking for the court (Mr. Justice Harlan dissenting), held that the words "due process of law" in this amendment, do not necessarily require an indictment by a grand jury in a prosecution by a State for murder. And in Munn v. Illinois, 94 U. S. 115, the Chief Justice says: "A person has no property, no vested interest in any rule of the common law. That is only one of the forms of the municipal law, and is no more sacred than any other. * * * * The law itself, as a rule of conduct, may be changed at the will or even the mere whim of the legislature, unless prevented by constitutional limitations." And in Walker v. Sauvinet, 92 U. S. 90, the court held that this amendment did not guarantee the right of trial by jury in all cases in the State courts. These cases tend to establish the doctrine that the rules and forms known to the common law in judicial proceedings, not affecting the ultimate rights of the party, are not necessarily guaranteed to a person under the Constitution; and it has long been established that the remedial process of the law may be altered at the will of the legislature, so it does not impair a vested right, or cut off the remedy altogether. The words "due process of law," then, must be directed at something deeper than the mere rules and forms by which courts administer the law. They evidently were intended to guarantee and protect some real and substantial right to life, liberty and property as the ultimate result, and probably to prohibit any arbitrary and oppressive proceeding by which the individual is deprived of either. There are certain things that are manifestly obnoxious to this provision. For instance the property of one person cannot be taken from him for private use and given to another, even though he is compensated for it, and is given every opportunity to be heard through all the forms and solemnity of judicial proceedings. Taylor v. Porter, 4 Hill, 140; Cooley's Constitutional Limitations, 357. Nor can a person be condemned without an opportunity to be heard and make his defense, although he may be guilty. When we go beyond a few well-defined landmarks in this direction, we are upon a broad sea of uncertainty. In any case we have to inquire if the person is imprisoned in violation of a due course of legal proceedings according to those settled maxims, rules and forms established for the protection of private rights against the arbitrary exercise of power unrestricted by established principles applicable to such rights and to the administration of justice.

By § 1, art. 3 of the Constitution of Kansas, the judicial power of the State shall be vested in certain courts therein named, and in such other courts interior to the Supreme Court as may be provided by law. Undoubtedly the Legislature has the constitutional right to establish inferior courts and define and limit their jurisdiction, powers and proceedings. Judicial powers may be conferred without expressly naming the tribunal a court, and those powers may be confined to one or more subjects of adjudication. They may be very limited or very extensive in their scope; and I am not prepared to say that a ministerial officer may not be selected to perform those judicial functions. The coroner of a county has both ministerial and judicial duties to perform. County commissioners have to some extent both duties imposed on them, and probably the same is true of the sheriff of a county. That the duties imposed on the county attorney under the eighth section of the act in controversy are judicial powers, must be admitted. He is to hear and determine, compel the attendance of witnesses by subpœna and attachment, and to punish them for disobedience to his writs. The power of courts acting within their jurisdiction to punish witnesses for contempt is a necessary and admitted power. It goes with the judicial attribute, and without it a court is powerless to enforce its orders or protect its dignity. The serious objections urged to the law under consideration is that the

county attorney is the public prosecutor for the State. He is the informer against offenders, and on his information parties charged with crime are put upon trial. The judicial powers conferred on him by this law are not to hear and determine matters in which he stands indifferent between the parties, but are given to aid and assist him in the performance of his ministerial duties, and have no other purpose; making the judicial powers auxilliary and subordinate to the ministerial duties, and are given him as a means by which he can more successfully procure evidence to institute and carry on prosecutions; and in this respect the powers given him are very great, and, in the hands of an unscrupulous man, stimulated by animosity or avarice, could be used as an instrument of sore oppression.

On the mere unsworn statement of any person, and without any case pending before him, it is made his duty under severe penalties to set this judicial machinery in motion, with no restriction as to whom he shall summon before him to testify, and no limitation but his own good will as to the scope of his investigation; fortified by a power to exact answers to any questions he sees proper to ask, almost despotic in its severity. The witness must answer the question, or go to jail for contempt. It may be answered that such is the case in all trials; but there is this wide difference: In trials in open court on issues made up between the parties, the relevancy and competency of the question is submitted to the court, and argument of counsel is heard; the rights of the witness, as well as the party, are discussed, considered and decided.

And what makes the power given by this law still more dangerous and objectionable is that the law makes it to the interest of the judge (county attorney) to find evidence of an offense committed. He is offered a reward to excite his vigilance and cupidity, and threatened with severe punishment if he fails or neglects to faithfully perform these duties. In some respects these duties are similar to those of a grand jury and court combined. The proceedings are preliminary, to ascertain if there is probable cause to charge the party with the offense, but a grand juror may be challenged on the ground that he is prosecutor or complainant or a witness upon a charge coming before him for investigation. Rev. St. Kan. 1879, p. 742, section 79. Nor can a grand jury issue a subpœna for witnesses, or decide the competency of a question asked, or punish for contempt. These matters rest with the court. Id. §§ 85, 86, 87 and 88. This provision of the act of March 7, 1885, is a strange combination of judicial and ministerial duties, aided with rewards and penalties; and, so far as I have been able to ascertain, is an anomaly to all the judicial proceedings known to the land. It attempts to unite the judicial with the executive branch of civil government; and when the law-making power and the power which declares and applies, as well as that which executes and administers the law, are united and vested in one person or body, it becomes a despotic, and not a constitutional government.

Are these objections sufficient to justify a court in the conclusion that a person restrained of his liberty under these proceedings is deprived of his liberty without "due process of law?" I am compelled to answer in the affirmative. I believe no precedent can be found for the application and use of judicial power in the manner and for the purpose contemplated by this act, and that it is a dangerous innovation on the fixed maxims and rules in the administration of justice established for the protection of private rights. In this conclusion I am also sustained by a recent decision of Judge Crozier of the First Judicial District. It is therefore ordered that the petitioner be discharged from custody.

WEEKLY DIGEST OF RECENT CASES.

1. BRIDGES—*Duty of Township—Duty of Officers—Liability for Damages.*—It is the general duty of a township to exercise through its officers a reasonable supervision over its ways and bridges, and within fairly practicable limits to be watchful of their condition and trustworthiness, and see that they are kept in a reasonably safe condition for public travel; and when it is generally known that a bridge has become decrepit, or when a bridge has stood so long that there is much suspicion of it, the officers of the township may not disregard the warning conveyed by these circumstances, and excuse their neglect to take action on the ground of having had no actual notice of a dangerous infirmity. [Medina v. Perkins, 48 Mich. 67; S. C., 11 N. W. Rep. 810, followed.] Such means should be employed by the officers from time to time in making their examinations as usually disclose the defects to be expected. *Stebbins v. Township of Keane*, S. C. Mich., Jan. 14, 1885; 22 N.W. Rep. 37.

2. —— *Evidence of Notice—Instruction.*—It is error to admit as evidence of notice of a defect in a bridge, the declarations of a commissioner to a third party after an accident had occurred, or to instruct the jury that they may consider such evidence in determining whether the township had notice of the condition of the bridge. *Ibid.*

3. —— *Negligence.*—It is only necessary for an injured party to show by proper testimony, knowledge on the part of the officers of such a state of facts as reasonably and necessarily make it their duty to examine and act in order to protect the traveling public, and their neglect so to do, in order to recover in an action against the township for injuries caused by a defective bridge. *Ibid.*

4. —— *Contributory Negligence — Evidence.* — Where the contributory negligence of the party injured in going upon the bridge at too great a

speed, is set up to defeat his recovery, evidence of what was said and done by plaintiff and his assistant, in regard to checking the speed of his engine and wagon before going upon the bridge, is admissible as part of the *res gestæ*. *Ibid.*

5. CONTRACT—*Novation—Consideration.*—W. was indebted to plaintiffs, and defendants were indebted to W. By W.'s request, defendants promised to pay the amount which they owed W. to plaintiffs instead of to him, and plaintiffs relinquished their claim in consideration of such promise, and defendant charged the amount to it on its own books. *Held*, that the transaction rested upon a sufficient consideration, and that plaintiffs were entitled to recover the amount from defendants. *Mulcrone v. American Lumber Co.*, S. C. Mich. Jan. 14, 1885; 22 N. W. Rep. 67.

6 ——. *Statute of Frauds.*—Where a party, who was not before liable, undertakes to pay a debt of a third person, and, as a part of the agreement, the original debtor is discharged from his indebtedness, the agreement is not within the statute of frauds. In giving the opinion of the court on this point, Champlin, J, said:—"The statute of frauds has no application to a case like the present. Bird v. Gammon, 3 Bing. N. C. 883; Dearborn v. Parks, 5 Greenl. 81; Rowe v. Whittier 21 Me. 545; Pike v. Brown, 7 Cush. 133; Barker v. Bucklin, 2 Denio, 45; Farley v. Cleveland, 4 Cow. 432; Rice v. Carter, 11 Ired. 298; Files v. McLeod, 14 Ala. 611; Robbins v. Ayres, 11 Mo. 538; Bowen v. Kurtz, 37 Iowa, 239. The rule has been stated to be that where a party who was not before liable, undertakes to pay a debt of a third person, and, as a part of the agreement, the original debtor is discharged from his indebtedness, the agreement is not within the statute. Packer v. Benton, 35 Conn. 343; Fairlie v. Denton, 8 Barn. & C. 395; Wilson v. Coupland, 5 Barn. & Ald. 228." *Ibid.*

7. CRIMINAL PROCEDURE.—*Adultery — Prosecution for should be Dismissed at Request of Wife.*—A prosecution for adultery, instituted on complaint of the wife of the accused, should be dismissed when she files a petition stating that she was persuaded to make the complaint, and desires to have the case discontinued and the accused discharged, for the sake of her children and her own peace and happiness. In giving the opinion of the court, Cooley, C. J., said: "The attorney general very properly declines to support the conviction in this case. The prosecution was for adultery, and could only have been instituted on the complaint of respondent's wife. How. St. § 9279. The wife made complaint, but afterwards filed a paper in court stating that she was overpersuaded to make it; that she would not have made it had she not been urged to do so; that she made it against her own feelings and wishes; 'that she has three little boys, of whom the oldest is only seven years, and that for the sake of her children and her own peace and happiness she most respectfully asks that Madison Dalrymple may be discharged, and that said cause may be discontinued.' Notwithstanding this request, the prosecuting attorney pressed the case to a conviction. Perhaps the letter of the statute was not disregarded in this action, but its spirit was. The conviction must be set aside, and the respondent discharged." *People v. Dalrymple*, S. C. Mich., Jan., 13, 1885; 22 N. W. Rep. 20.

8. FEDERAL AND STATE JURISDICTION.—*Injunction in Federal Court to Stay Proceedings in State Court.*—While an action of replevin, instituted by H, was pending in the State court, he filed a bill in equity in the United States court to reform the chattel mortgage under which he claimed the property. Judgment was rendered against him in the State court, and suit brought on the replevin bond, whereupon he filed a supplemental bill in the United States Court, praying an injunction. On motion for a preliminary injunction to stay proceedings in the suit on the bond until final decree on the bill, *held*, the injunction could not be granted. Carpenter, J., said: "The statute, in terms, prohibits the granting of an injunction to stay proceedings in a State court, except when authorized in bankruptcy proceedings. Rev. Stat., § 720. This statute has been held, however, to apply only to cases where the proceedings are first commenced in the State court. Fisk v. Union Pac. R. Co., 10 Blatchf. 518; French v. Hay, 22 Wall. 250; Dietzsch v. Huidekoper, 103 U. S. 494." *Hamilton v. Walsh*, U. S. Cir. Ct., Dist. R. I.; April 16, 1885; 23 Fed. Rep. 420.

9. HUSBAND AND WIFE.—*Conveyance by Wife—Reserving Joint Life Estate—Execution.*—B conveyed certain land to her son, reserving a life-estate therein for the joint lives of herself and husband. A creditor of the husband obtained a judgment against him, sold his interest thereunder, purchased the same at execution sale, and after expiration of the period for redemption brought ejectment for the land. *Held*, that the husband's interest was an entirety, and not subject to execution. *Vinton v. Beamer*, S. C. Mich., Jan. 13, 1885; 22 N. W. Rep. 40.

10. INTERSTATE LAW.—*Estates of Decedents—Foreign Administration—Domicile—Public Administrator under Missouri Statute—Sale of Mortgage in Michigan—Foreclosure.*—S, a bachelor, who had previously been a citizen of Michigan, went to St. Louis, Missouri, where he engaged in business, and on March 27, 1876, died intestate at the hotel where he boarded. He left heirs in New York, Minnesota and Michigan. He owned land and claims, secured by mortgage, in Michigan, amounting to $50,000; one mortgage, executed by A and wife, for $1,125 and interest, being payable at St. Louis, Missouri, or at any other place that S might elect, in five years from date. L, as public administrator, claimed the right to administer on the estate in St. Louis, and notified by telegraph the heirs in Michigan of the death of S, and sent his body to them, as requested. R, a brother-in-law of S, on May 29, 1876, took out letters of administration in Michigan, and called on L for the property, which L refused to deliver, insisting on his right to act as public administrator. In June, 1876, L made public sale of the securities belonging to the estate for a mere nominal price, and F became the purchaser of the A mortgage, with knowledge of the appointment of R, and subsequently assigned the mortgage to B, who executed a discharge thereof on payment of $600. M afterwards bought the land. R died in September, 1878, complainant was appointed as his successor, and a suit was instituted to foreclose the mortgage. *Held*, 1. That although S was at the time of his death domiciled in St. Louis, L was not authorized by the Missouri Statute to take charge of his estate as public administrator; and (2) that as public administrator he had no authority, after the appointment of R as administrator, to sell and assign the mortgage in suit, and that the mortgage should be foreclosed. [Sherwood, J., dissenting.] *Reynolds*

v. McMullen, S. C. Mich., Jan. 14, 1885; 22 N. W. Rep. 41.

11. JUDGMENTS—*Power of Inferior Courts to Vacate or Modify their own Judgments.*—In Nebraska a county court for sufficient cause may vacate or modify its own judgments, in term cases, during the term at which they were rendered. In giving the opinion of the court, Maxwell, J., said: "It will be seen that in term cases the practice to a considerable extent is the same as in the district court; and, without doubt, the same power exists to control its judgments during the term at which they are rendered. That the district courts possess the power to vacate or modify their own judgments at the term at which they are rendered, is unquestioned. Smith v. Pinney, 2 Neb. 139; McCann v. McLennan, 3 Neb. 27; Wise v. Frey, 9 Neb. 220; S. C., 2 N. W. Rep. 375; Hansen v. Bergquist, 9 Neb. 277; S. C., 2 N. W. Rep. 851. This power is conferred to prevent injustice, as where a judgment is entered by mistake, or under such circumstances as to satisfy the court that it ought to be set aside. In Millspaugh v. McBride, 7 Paige, 509, it is said: "I think the counsel for these defendants has been successful in showing that it is within the power of the court to open a default, even after enrollment, for the purpose of giving a defendant an opportunity to make his defense, where such defense is meritorious, and he has not been heard in relation thereto, either by mistake or accident, or by the negligence of his solicitor. The cases of Kemp v. Squire, 1 Ves. Sr. 205, and of Robson v. Cranwell, 1 Dick. 61, show that the enrollment may be discharged when necessary for the purpose of opening the decree; and in Beekman v. Peck, 3 Johns. Ch. 415, Chancellor Kent set aside a regular decree by default, upon motion, after enrollment, to let in a defense upon the merits. See, also, Tripp v. Vincent, 8 Paige, 176; Curtis v. Ballagh, 4 Edw. Ch. 635; Herbert v. Rowles, 30 Md. 271; Loree v. Reeves, 2 Mich. 133; Hurlburt v. Reed, 5 Mich. 30; Freem. Judgm., § 100. In Hansen v. Bergquist, 9 Neb. 269; S. C., 2 N. W. Rep. 858, it was held, in effect, that county courts possess the power to vacate or modify their own judgments during the term at which they were rendered; and such ruling is in furtherance of the proper administration of justice. We therefore adhere to it." *Volland v. Wilcox*, S. C. Neb., Jan. 6, 1885; 22 N. W. Rep. 71.

12. JUDICIAL SALES.—*A Sale of Land other than before Court-House Door of County where Land Lies is Void.*—A sale of land, under execution issued out of a United States Court, made by the marshall at any other place than the court-house door of the county in which the land is situated, is not merely voidable, but void, and conveys no title. *Sinclair v. Stanley*, Sup. Ct. Tex., April 28, 1885; Texas Law Rev., 272.

13. ———. *One Holding under Such Sale is a Trespasser.*—One holding through a lease from one claiming title through a United State's marshall's sale made at the court-house door of the United States Court is a trespasser. *Ibid.*

14. LIFE INSURANCE.—*Reinsurance—Oral Promissory Representation.*—The failure of an insurance company that procures reinsurance to comply with an oral promissory representation in regard to its future conduct, made without fraud or falsehood, before the policy was issued, and not alluded to therein, is not a valid defense against the insurer's liability upon the policy. *Prudential Assur. Co. v. Ætna Ins. Co.*, U. S. Cir. Ct., D. Conn., April 14, 1885, 23 Fed. Rep. 438.

15. MUNICIPAL CORPORATIONS.—*Power of City to Impose Burden of Improving Streets on Abutting Property Owners.*—The Legislature has the power to lawfully confer upon a city the authority to cause its streets to be improved, and impose a part of the cost of such work upon the property abutting thereon by frontage. *Taylor v. Boyd*, S. C. Tex., March 27, 1885; 5 Tex. Law Rev. 198.

16. ———. *What Notice is Necessary before Assessment is Legal.*—The assessment made against a property owner whose property adjoins a street improved is legal without further notice given the property owner than the requisite proceedings had by the city in the passage of the ordinance and resolutions necessary under the charter of the city to the improvement. *Ibid.*

17. ———. *Charter not in Conflict with Constitution in Providing for Collection of Tax by Contractor.*—The charter of the city of Houston, providing for the issuance of certificates to the contractor and the collection thereof by him is not in conflict with any provision of the Constitution, and the contractor may maintain a suit on such certificates as fully as the city might have done had the work been done under its own direction and management. On this point the court, per Stayton, J., said: "We see no valid objection to the maintainance of this action by the contractors as fully as the city might have done had the work been done under its own direction and management, and not by a contractor, and especially so when the law expressly authorizes the owner of such a certificate to sue. This seems to be a not uncommon mode for collecting such assessments. [Cooley on]Taxation, 470; Chambers v. Sarterlee, 40 Cal. 499; Taylor v. Pabneer, 31 Cal. 248; N. I. R. R. Co. v. Connelly, 10 Ohio St. 160; City v. Hardy, 35 Mo. 264; City v. Armstrong, 37 Mo. 33; City v. Coons, 38 Mo. 48.]" *Ibid.*

18. ——— *Tax not Necessary to be Levied on Each Piece of Property—May be Levied on all Together.*—The fact that the tax was levied on all the property of the owner abutting on the street, does not render it void, the charter not providing that the tax shall be assessed against each particular piece of property owned, but that the tax so levied shall be a tax against such owner or owners, and a lien, charge and encumbrance upon the property so held and owned by each. *Ibid.*

19. ——— *Constitutional Provisions Limiting Power of Taxation do not Apply to Street Improvements.*—§ 5, Art. 16, Constitution limiting the power of taxation, does not apply to local assessments for the improvement of streets, etc., but to such as are annually collected for the ordinary purposes of municipal government. On this point Stayton, J., said: "It is well settled that the rule that 'taxation shall be equal and uniform' has not been, and in the nature of things cannot be, applied to such local assessments. [Roundtree v. City of Galveston, 42 Tex. 626; Allen v. Galveston, 51 Tex, 320; Cooley on Taxation, 444, 446; Dillon Mun. Corp. 777, 778, 755 *et seq.*]" *Ibid.*

20. ——— *Certificates Prima Facie Evidence.*—The declaration contained in the Charter of the City of Houston as to the weight to be given the certificate issued to the contractor as evidence, makes them

prima facie proof of the facts necessary to be proved by the contractors to maintain their action. *Ibid.*

21. —— *Tax Deeds Prima Facie Evidence when Made so by Statute.*—Tax deeds, and other improvements under statutes so declaring, have been held *prima facie* evidence of facts which the law declares they shall so evidence, and the validity of such laws cannot be questioned. *Ibid.*

22. PLEADING—*Cause of Action—Plaintiff's Pleadings Define the Subject.*—A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings. *Louisville N. R. Co.* v. *Ide*, Sup. Ct. U. S., March 23, 1885; 5 S. C. Repr. 735.

23. —— *Rule in Several States—Effect as to Joint Suits.*—The rule in some of the States, that when several parties are sued upon a joint contract, and it appears that only a portion are bound, the plaintiff may recover against those who are actually liable, does not make a joint contract several, nor divide a joint suit into separate parts. *Ibid.*

24. REMOVAL OF CAUSE — *Petitioner must First Show Cause — Petition not Enough.* — A State court is not bound to surrender its jurisdiction, by removal under the act of 1875, until a case is made which, on the face of the record, shows that the petitioner is entitled to such a removal. The mere filing of a petition is not enough, unless, when taken in connection with the rest of the record, it shows on its face that the petitioner has, under the statute, the right to take the suit to another tribunal. *Gregory v. Hartley*, Sup. Ct. U. S., March 16, 1885; 5 S. C. Repr. 743.

25. —— *Time of Filing Petition—First Term at which Case Triable.*—The act of 1875, c. 137 (18 St. 470,) provides that the petition for removal must be filed at or before the term at which the cause could be first tried, and before the trial; that is, the first term at which the cause could have stood for trial had the parties taken the usual steps as to pleadings and other preparations. In ruling this point, Waite, C. J., said: "The act of 1875, c. 137, (18 St. 470,) which governs this case provides that the petition for removal, must be filed at or before the term at which the cause could be first tried, and before the trial. This has been construed to mean the first term at which the cause is in law triable,—the first term in which the cause would stand for trial if the parties had taken the usual steps as to pleadings and other preparations. Babbitt v. Clark, 103 U. S. 606; Pullman Palace Car Co. v. Speck, 113 U. S. 87; s. c., *ante*, 374. It has also been decided that there cannot be a removal after a hearing on a demurrer to a complaint because it does not state facts sufficient to constitute a cause of action. Alley v. Nott, 111 U. S. 472; s. c., 4 Sup. Ct. Rep. 495; Scharff v. Levy, 112 U. S. 711; s. c., *ante*, 360." *Ibid.*

26. —— *Effect of Hearing on Demurrer to Complaint.*—There cannot be a removal after a hearing on a demurrer to a complaint, because it does not state facts sufficient to constitute a cause of action. *Ibid.*

27. —— *Allegation of Citizenship.*—As a party may be a resident of a State without being a citizen thereof, a simple averment that a party seeking to remove a cause is a resident of a certain State is not sufficient. *Kelly v. Houghton*, U. S. Cir. Ct. D. Cal., April 20, 1885; 23 Fed. Rep. 417.

28. —— *Principal Relief Asked—Single Cause of Action—Answer—Separate Controversy.*—A suit against a railroad company, resident in the State of the complainant, to which suit an individual non-resident has been made a party defendant only in aid of the principal relief asked,—which is the transfer to plaintiff of stock standing in the name of the last-named defendant on the books of such company,—is a suit in truth and in form against both defendants upon a single cause of action, and cannot be removed from a State to a Federal court unless the separate answer of the non-resident defendant introduces a separate controversy. *St. Louis & S. F. R. Co. v. Wilson*, Sup. Ct. U. S., March 23, 1885; 5 S. C. Repr. 738.

29. —— *Separate Answer—Act of 1875.*—A claim of a right to a removal by one of several joint defendants, based entirely on the fact that the petitioning defendant has presented a separate defense to the joint action by filing a separate answer, tendering separate issues for trial, is not good. The filing of such an answer is not enough to introduce a separate controversy into a suit within the meaning of the act of 1875, § 2. *Louisville & N. R. Co. v. Ide*, Sup. Ct. U. S., March 23, 1885; 5 S. C. Repr. 735.

30. —— *Joint Action—Separate Defenses.*—A separate controversy is not introduced into a case by separate defenses to the same cause of action. *Louisville & N. R. Co. v. Ide*, 5 Sup. Ct. Rep. 735, following, *Putnam v. Ingraham*, Sup. Ct. U. S., March 23, 1885; 5 S. C. Rep. 746.

31. —— *Default of One of Several Joint Defendants.*—The default of one of several joint defendants does not prejudice the plaintiff in his right, in case he sustains the allegations of his complaint, to a joint judgment against all the defendants. *Ibid.*

32. TRADE-MARK.—*Use by Assignee or Purchaser—Deception — Infringement — Injunction.*—An assignee or purchaser of a trade-mark from the original proprietor must, in the use thereof, indicate that he is assignee or purchaser, or he will not be entitled to protection in the use of the mark so assigned. In his opinion, Colt, J., said: "A trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied. Canal Co. v. Clark, 13 Wall. 311. It imports that the article is made by the original proprietor, and therefore genuine, and the law protects the original proprietor, not only as a matter of justice, but to prevent imposition on the public. Manhattan Medicine Co. v. Wood, 108 U. S. 218; s. c., 2 Sup. Ct. Rep. 436. Now, in order that the public may not be deceived, it is essential that an assignee or purchaser of the original proprietor should indicate in the use of the trade-mark that he is assignee or purchaser—Sherwood v. Andrews, 5 Amer. Law Reg. (N. S.) 588—otherwise the public are misled into purchasing the goods of another manufacturer or vendor as those of the original proprietor." *Stachelberg v. Ponce*, U. S. Cir. Ct., Dist. Me., Feb. 23, 1885; 23 Fed. Rep. 430.

33. TRESPASS. — *Damages, Actual and Punitory—One who Ejects Trespasser by Force, etc., Liable*

for.—Where one holding under such lease as is above mentioned is forcibly ejected from the premises by a claimant of the land, and his property destroyed and himself and family subjected to insult and outrage, such claimant is liable both in actual and punitory damages. *Sinclair v. Stanley*, Sup. Ct. Tex., April 28, 1885: Texas Law Rev. 272.

34. ———. *Error in Charge Calculated to Increase Exemplary Damages.*—But where the court charges the jury that a trespasser has good title to the land, it is held such error as will reverse the judgment because it was calculated to increase the amount of punitory damages found by the jury. *Ibid.*

RECENT ENGLISH DECISIONS.

BILL OF SALE OF FUTURE CHATTELS.—*Assignment by Second Bill of Sale of Same Chattels when in Possession—Seizure by Holder of First Bill of Sale—Right of Holder of Second Bill of Sale.*—In the case of Hallas v. Robinson, before the Court of Appeal, No. 1, on the 26th of February, the question was whether, where a transferee of a bill of future chattels has seized such chattels when acquired by the grantor, his title is to be preferred to that of the holder of a second bill of sale made at a time when such chattels had been so acquired. In September, 1875, R, by way of security, assigned, by bill of sale, to M, all goods then being, or which might be, upon certain premises. In February, 1882, R gave the plaintiff a bill of sale of goods then being on the same premises. The plaintiff had no notice of the prior bill of sale. The plaintiff attempted to seize under his bill of sale, but found the defendant in possession, who claimed the goods on the premises by virtue of an assignment of the first bill of sale. The plaintiff, after demand and refusal, brought an action to recover such goods as were comprised in his security. At the trial before Butt, J., it was proved that some of the goods of which the defendant was in possession were on the premises at the date of the plaintiff's security, and had been brought there by R after the date of the first bill of sale. Butt, J., gave judgment for the defendant, being bound by the case of Joseph v. Lyons, since reversed on appeal (see 33 W. R. 145). The plaintiff appealed. The court (Brett, M.R., Baggallay and Lindley, L.JJ.) allowed the appeal. Brett, M. R., said that the defendant had a right under the first bill of sale to take possession on default, and, if nothing else had happened, and he had done so, he would have had a legal title in the subsequently acquired goods, in which, up to that time, he would have had only an equitable title as decided in Joseph v. Lyons. But whilst he had only that equitable title, and after those goods were on the premises, the grantor assigned them by bill of sale to the plaintiff, the effect of which was to give him a legal title subject to the defendant's equity. That legal title could not be ousted by reason of the defendant taking possession. The defendant was in the position of a person who has bought goods already sold to some one else, in which case the person on whom the fraud has been committed must suffer. Baggallay, L.J., was of the same opinion. There was no real distinction between Joseph v. Lyons and the case in question. Lindley, L.J., concurred.—*Solicitor's Journal* (London).

RAPE.—*Sexual Intercourse Obtained by Personating Husband.*—The important decision of the Irish Court for the Consideration of Crown Cases Reserved in Reg. v. Dee (14 L. Rep. Ir. 468), adds another to the already long string of decisions on the question whether a man who induces a married woman to submit to intercourse by personating her husband is guilty of the crime of rape. The important feature in the decision is, however, that a strong and unanimous court decided in favor of the view which morality requires to prevail, notwithstanding the contrary decisions of the English courts. These decisions, beginning with Rex v. Jackson (Russ. & Ry. 487), and ending with Reg. v. Barrow (19 L. T. Rep. N. S. 293; L. Rep. 1 C. C. R. 156) Reg. v. Flattery (36 L. T. Rep. N. S. 32; L. Rep. 2 Q. B. Div. 410); and Reg. v. Young (38 L. T. Rep. N. S. 540; 14 Cox C. C. 114), are fully discussed in the judgments of the Irish judges, and, although the terms used are strong, many will be of opinion that the view of that eminent judge, Mr. Justice Lawson, with respect to some of them, that "they are not only revolting to common sense, but discreditable to any system of jurisprudence," is amply justified. The question was stated by the same judge to be—what must be the nature of the woman's consent? And he answered the question by saying that, in his opinion, it must be consent to the prisoner having connection with her, and that if either of those elements were wanting, it was no consent. Thus, in Reg. v. Flattery, where she consented to the performance of a surgical operation, and under pretence of performing it the prisoner had connection with her, it was held clearly that, as she never consented to the sexual connection, the case was one of rape. So, if she consented to her husband having connection with her, and the act was done, not by her husband, but by another man personating the husband, there was no consent to the prisoner, and it was rape. The general principles of the law as to consent applied to the case, and to constitute consent there must be the free exercise of the will of a conscious agent, so that intercourse with an idiot, or a woman in a state of unconsciousness, or one compelled by duress or threats of violence, was rape. As the Lord Chief Justice of Ireland said, in the surgical cases there was no *consensus quoad hoc*, in the personation cases there was no *consensus quoad hanc personam*, and the consent to submit to a lawful marital act was wholly different in its moral nature from a consent to an act of adultery. The question decided in the case is a very distasteful one, but while any necessity exists for determining such questions at all, few will doubt that the interests of the community demand that they should be determined in the way in which the Irish judges decided in Reg. v. Dee.—*Law Times* (London).

UNDERGROUND WATER—*Pollution of Well—Right of Action by Owner of Adjoining Well.*—In the case of Ballard v. Tomlinson, before the Court of Appeal, No. 1, on the 17th of February, the question was as to the right of an owner of a well, to bring an action against the owner of another well, who, by discharging sewage into his well, had polluted the underground water which was the common supply of both wells. Since 1849 the plaintiff, a brewer at Brentford, drew water from a well sunk to a depth of 222 feet into the London clay, and bricked round. From the bottom of the well a pipe was carried through the Thanet sand into the chalk to a depth of 300 feet from the surface. From the sand and chalk, which were water-bearing strata, the water found its way by natural pressure into the well, from which the plaintiff raised it by pumping. About ninety-nine yards from that well, the defendant also had a well of similar construction and depth, and going down through the same strata, but the surface of the ground was about 10 feet higher than at the plaintiff's well. Both wells were supplied from the underground water. The defendant having made a

drain by which sewage was discharged into his well, the plaintiff complained that the sewage had polluted the water in his well, and he claimed an injunction to restrain the defendant from so using his well as to pollute the water in or coming into the plaintiff's well, and he also claimed damages for the injury caused by the pollution. Pearson, J., gave judgment for the defendant, being of opinion that the plaintiff had no greater right to the quality of the water than he had to the quantity, and that it was one of the incidents of the use of the water that the plaintiff should take it subject to everything which had occurred to it by reason of the use of it by other landowners before it reached his land (see report, 32 W. R. 589, L. R. 26 Ch. D. 194). The plaintiff appealed. The court (Brett, M.R., and Cotton and Lindley, L.JJ.) allowed the appeal. Brett, M.R., said that it could not be denied that sewage had been collected in an artificial shaft on the defendant's land, and that it had percolated or been drawn through by the plaintiff's act into the water under the plaintiff's land. Percolating water is a common reservoir or source, in which no one has any property, but from which anyone has a right to appropriate any quantity. The question was whether any one of those who have that unlimited right of appropriation, but of whom each has no greater rights than the others, has a right to contaminate the common reservoir, or whether he is bound not to do anything which would prevent any of those persons obtaining the full value of their right. It was true that the defendant, by polluting the common reservoir, did not pollute that in which the plaintiff had any property. If all the plaintiff could show was that the common source was contaminated, he could not, before he had appropriated any part of it, maintain an action in respect of that contamination. But it did not follow that he could not maintain the action when he had appropriated it, if there was evidence that the water which he had a right to appropriate had been contaminated by that which another person had done to the common source; in other words, although no one has any property in such a source, yet, inasmuch as everyone has a right to appropriate it, he has a right to appropriate it in a natural state, and no one has a right to contaminate the source so as to prevent his neighbor having his right of appropriation. As to the point that the pollution would not have occurred but for plaintiff having used artificial means, the question of natural—as distinguished from unnatural—user never applied to plaintiffs, but only to defendants. The question of natural and unnatural user only goes to this: that, although a defendant does contaminate water, or anything else which goes on his neighbor's land, yet, if that act is only the natural user of the land, and although by that act the neighbor is injured, the defendant is not liable, because otherwise he could not use his land at all. Therefore he was unable to agree with Pearson, J., on the ground that no one has any property in percolating water, which, as it comes from a common source, every one has a right to appropriate, but no one has a right to injure. Cotton, L. J., was of the same opinion. The right to underground water was an incident of ownership of land. The defendant was not exercising that natural right by sending his sewerage into the underground water. As soon as the defendant's act interferred with the plaintiff's natural right, there was a cause of action. Lindley, L. J., was of the same opinion.—*Solicitor's Journal* (London).

CORRESPONDENCE.

A NEW CRITIC.

To the Editor of the Central Law Journal:

I cannot forbear expressing my approval of your article in No. 21, "A New Critic." Your views, as usual, are sound; but— (Ah! there is the fatal "but") I would to God you had punctured the silly piece of effrontery in the *Columbia Jurist* found in your quotation on p. 401, second column, line 8, " * * * the far West, where we send so many lawyers," etc. The booby boy who penned that line must be a second cousin of one who came "West" from Harvard a few years since, and, with the ink scarcely dry on his "sheepskin," offered to go into partnership with our revered jurist, Judge Ranney, "on halves," and felt greatly chagrined that the offer was not eagerly grasped. ***

Akron, Ohio.

REMARKS.—The Eastern boy who has never been West, has a very poor opinion of Western men. He supposes that all the culture and refinement exist in the East. In fact, he is like a kitten that has not got its eyes open. Bye and by he comes "out West," and after he has lived "out West," a few years, he looks back upon his youthful ideas concerning Western character and manners, with a feeling of mingled incredulity and self-reproach. We have as good a law school in St. Louis as Columbia is. We have as good a one at Ann Harbor. As good law books have been published in Chicago, St. Louis and San Francisco, as have ever been published in Boston, New York or Philadelphia. Legal journalism is in a much more flourishing condition in the West than in the East. The Columbia boy will learn this as soon as the scales of provincialism fall from his eyes. When he comes "out West," notwithstanding his poor opinion of us, he will be welcomed with a heartiness of which his Eastern experience has given him no conception. Borrow a wheelbarrow, young man, and come West.

ED. C. L. J.

ANOTHER LAWYER'S WILL.

To the Editor of the Central Law Journal:

I clip the following from a St. Louis newspaper:—

THE TODD HOMESTEAD.—As will be seen by the following document, found among the late Albert Todd's papers yesterday afternoon, Mrs. Todd may remain in possession of her present handsome residence, on Lafayette and Todd avenues, the rest of her life:

"Whereas, my beloved wife has chosen the property situate on the northwest corner of Lafayette and Todd avenues, consisting of a two-story double house with a mansard roof, and a plot of ground of 200 feet front on Lafayette Avenue, by a depth of 260 feet more or less, along the west line of Todd avenue to Henrietta street, for a permanent residence during her life. Now, know all men by these presents that I, having purchased the same for the aforesaid purpose, hereby promise and guaranty to her its use and enjoyment, by her personally, with such others as she may admit, for her home and residence during her lifetime, and that she shall not be disturbed in such personal use and enjoyment of said property by me, my heirs or assigns, during her lifetime, against her free desire and wish.

"Witness my hand and seal this 2d day of October, A. D. 1883. ALBERT TODD."

The instrument was acknowledged before Notary Thomas M. Barron.

What is this? And what would a moot court say it

was? And what would they say of an attorney of forty years standing writing such a document? ***

ANSWER.—They would probably say that it was another case of a man trying to have himself for his lawyer, and having a very unwise man for his client. Mr. Todd may have proved himself to be not more wise than the late Samuel T. Glover; and Mr. Glover was not more wise than Lord Westbury; and Lord Westbury was not more wise than Lord St. Leonards. The first and last of these lawyers were conveyancers, but none of the last three was able to make his own will. But one ought not to say this hastily of Mr. Todd. The paper above quoted may be perfectly valid as a testamentary deposition; but it was probably intended by the noble old lawyer who wrote it, as a mere personal request to his surviving relations, and without doubt they will sacredly obey it as such.—[ED. C. L. J.

QUERIES AND ANSWERS.

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

27. An administrator, believing his decedent's estate to be solvent, and, at the request of a claimant for an account against the estate, pays the claim in full. The estate turns out to be insolvent. Can the administrator recover back from such claimant the amount thus paid, over what per cent. the estate paid, under a mistake of fact as to the solvency of the estate, or must the administrator loose the amount thus paid? If he cannot recover, can such administrator recover on a written agreement to pay back in case of insolvency? Where can authorities be found on the questions?

M.

28. A citizen dies intestate, leaving real estate in 1868. In 1874 the State Legislature passes an act as follows: * * "Real property may be taken, acquired, held, etc., by an alien in the same manner in all respects as by a natural born citizen." Can this State in 1878 escheat this property against the claims of an alien claimant who is next of kin? In what lies, if any, the difference between naturalization, which is not retroactive, and the removal of alien disability by an act of Legislature?

SUBSCRIBER.

29. If a man, tried, convicted and condemned to suffer the death penalty by hanging, is by the sheriff (the legally constituted officer to perform the sentence of the court) duly and legally hanged at the time specified by the court, is *pronounced dead* by competent physicians appointed by the proper authority for that purpose, is then cut down by the sheriff and delivered to his friends for interment, and the warrant is properly returned to court by the sheriff, and is afterwards resuscitated, can he be again hanged under the same conviction, or is he a free man, having paid the penalty of the law? Answer, giving authorities.

T. W. A.

Houston, Tex.

[You will have to put this query to an older hangman than we are.—ED. C. L. J.]

RECENT PUBLICATIONS.

POMEROY'S ESTEE'S PLEADINGS. Pleadings, Practice and Forms, adapted to Actions and Special Proceedings under Codes of Civil Procedure. By Morris M. Estee, Counsellor at Law. Third Edition. Revised, Enlarged and Re-written. By Carter P. Pomeroy, Counsellor at Law. In three volumes. San Francisco: A. L. Bancroft & Co. 1885.

We are glad to believe from an examinatien of this work that the revision has been quite thorough, that a number of valuable forms have been added, applicable in all the States and Territories which practice under a code, and that the citations have all been verified by reference to the original books, so as to correct clerical and other errors. If there is anything that tries the patience of an overworked practitioner, it is to find a case cited in support of an important proposition in a law book, and to take down the volume of reports from which it is cited, and to find that no such case is there.

It is scarcely necessary to speak of the merits of this work. It took a position in the front rank of practical law books from the time when it first appeared in 1869. Its merit consists in the fact that it does more than discuss general principles. It enters into details and dwells largely upon the application of principles. A legal principle is like an edged tool: every one understands that it is used to cut with, but it requires experience and training to know how to cut with it without cutting one's self. If the most learned of law professors—and we refer only to those whose lives have been given up exclusively to teaching—were placed upon a bench of *Nisi Prius*, his rulings would be characterized by frequent misapplications of legal principles of so glaring a nature that a lawyer, far less learned, who had grown up in the practical work of the law, would have readily avoided them.

This illustrates what we mean to say: The law book is very deficient which expounds principles only. The difficulty lies in the application. Every rule is hedged about with limitations and exceptions. It is just as necessary for the practitioner to understand these limitations and exceptions as to understand the rule itself. For instance, it is stated in this work that the rules of code pleading do not tolerate the stating of conclusions of law. That is a general rule of pleading, yet how vital are the exceptions to it! Take the form of our action of ejectment in Missouri. All that it is necessary to state is that the plaintiff was, on a day named, entitled to possession of certain described premises, and that the defendant, on a subsequent day named, entered upon such premises and unlawfully holds from plaintiff the possession thereof. It is perceived that the most essential allegation of this petition is a conclusion of law, namely, that the plaintiff, on the day named, was entitled to the possession of the premises described. The whole struggle of the plaintiff at the trial will consist in presenting such evidence as will make it appear, as a conclusion of law, that he was so entitled.

Now the value of this work consists in the fact that it not only expounds the principles of pleading, but that it also tells the practitioner what he can do and what he cannot do in the application of those principles.

JETSAM AND FLOTSAM.

MISSOURI JUSTICE.—The following anecdote, exscinded from a longer story lately published in a leading legal periodical, having been republished and enjoyed in England, may perhaps be reprinted here without exciting local ill-feeling, with the additional statement that we know the author of it to be a gentleman of the utmost candor. We assure our distant readers that it is *not* a fair sample of Missouri justice: A writer in the *American Law Review* gives an account of the pro-

ceedings in the Circuit Court of Missouri within the last two years. The writer appeared as advocate, and, "after a good deal of idle and desultory talk, lasting at least an hour, the trial was resumed. I soon had occasion to make objection to a question propounded by the opposing counsel, when, to my surprise, the judge, instead of passing on my objection, remarked: 'Now, if you lawyers think I'm going to hear any argument on objections, you'll find yourselves very much fooled. I won't do it.' He then graciously announced that we could make all the objections we wanted and put them in our bill of exceptions, thereby intimating that he would not even pass on objections; and on that intimation he acted all the way through. Finally the case was submitted just before the dinner hour. After recess, his Honor resumed his place on the bench, and after hearing some minor motions, he descended and approached me with the remark: 'If you want to smoke here you can do so. It's not very dignified to smoke on the bench, but I'm going to smoke a cigar.' Which cigar he proceeded to light, as I did mine, although there were a number of placards on the walls of the court-room—'No smoking allowed in this room while the court is in session.' His Honor then proceeded to pass a sentence on two colored men who had been convicted at that term. After this, his legs stretched across the bench and his cigar glowing brightly, his Honor proceeded to deliver judgment in my case in the following words:—'The decree of the Supreme Court, affirming the judgment of the Court of Common Pleas, is set aside. The judgment of the last-mentioned court is also set aside, and the case remanded to that court for new trial, in accordance with the original opinion of the Supreme Court.' Which original opinion that court itself had repudiated on rehearing. The court thereupon adjourned, and the writer left at once, to muse over the uncertainties of law, and to ponder over the spectacle of an inferior court deliberately overruling the Supreme Court of the State."

THE ORIGIN OF LEGAL VERBOSITY.—The *Scottish Law Review* reports an address by Sheriff Guthrie Smith before the Aberdeen Judicial Society, in which he referred to the present arrangements for the procurator's remuneration. "His fee in an ordinary case amounts to nearly a uniform sum, but, in rendering his bill, he is required to split it up into seventy or eighty eighteenpenny items. The many objections to this antiquated system did not escape the keen eye of Adam Smith, who observes:—'It seems the custom in modern Europe to regulate, upon most occasions, the payment of the attorneys and clerks of court according to the number of pages which they had occasion to write; the court, however, requiring that each page should contain so many lines, and each line so many words. In order to increase their payment, the attorneys and clerks have contrived to multiply words, and that of necessity has led to the corruption of the law language of, I believe, every court of justice in Europe. A like temptation might, perhaps, occasion a like corruption in the form of law proceedings.' I think," added the sheriff, "that the time has arrived when this system requires to be reconsidered." — *Solicitor's Journal.*

CALLING UPON THE PRISONER BEFORE SENTENCE.—Scenes like that which occurred upon the conviction of Lee for murder at the Central Criminal Court are frequent, and arise from the practice of 'calling upon' the prisoner after verdict and before sentence. When Lee proposed, in response to the usual question, to discuss the evidence over again and was stopped by the judge, he said: 'Then, why am I asked if I have anything to say? It is a mere farce.' So it is, and a wrangle between judge and prisoner, in which the prisoner has the better of the judge, is not a seemly preliminary to the judge passing sentence of death. The practice of calling on the prisoner after verdict now that the legal technicalities which used formerly to be raised at that stage no longer exist, answers no purpose except to tempt the prisoner to reopen the facts of his case, or to glory in or justify his crime. If it is still desirable that the prisoner should have an opportunity of moving in arrest of judgment, the formula might at least be altered in accordance with the fact, so that he may be called on to allege any ground of law why sentence should not be passed, and not at so supreme a moment be solemnly invited to do what he is instantly forbidden doing as soon as he attempts it.—*Law Journal* (London).

DYNAMITING.—Dr. Wharton's recent paper in the *Criminal Law Magazine* on "Dynamiting and Extra-Territorial Crime," has been reprinted in several successive numbers of the *Irish Law Times*.

UNCERTAINTY OF THE LAW.—It is never to be forgotten, that what is called the uncertainty of the law is in great part really the uncertainty of facts; and the uncertainty of facts increases in geometrical ratio with the lapse of time, owing to the opportunity for forgetfulness on the part of witnesses, and the entanglement of their interest and feeling in one side or the other of the controversy.—*Daily Register.*

WORK OF THE TEXAS APPELLATE COURTS.—The following tabulated statement of the amount of work transacted by the Higher Courts during their late sessions at Galveston gives an idea of the amount of labor done by them, the status of their dockets, and the great error committed by the Legislature in the passage of a bill which will render the Commission of Appeals a creature of the past after the present Austin term:

Number of cases disposed of	200
Affirmed	96
Dismissed	22
Reversed and dismissed	2
Reversed and remanded	65
Reversed and rendered	15
Motions for rehearing overruled	24
Motions for rehearing granted	3

Of these, eighty-five were reports of the Commission of Appeals, which were adopted by this court.—*Texas Law Review.*

WILD WESTERN JUSTICE.—A Chicago judge recently rebuked a person who was sitting in the court-room with his feet placed upon the table, by sending him, through a bailiff, a piece of paper on which he had written the following query: "What size boots do you wear?" The feet were at once withdrawn; but the gingerly manner in which the judge acted does not seem in keeping with "wild Western justice."—*Boston Advertiser.*

FEDERAL DECISIONS.—The *Daily Register* says of this publication: "This enterprise of the Gilbert Publishing Company of St. Louis, Mo., we suppose to be the first practical effort to realize the ideal—which, if we remember correctly, originated with Lord Bacon and has been held up to expectation by jurists and law reformers during the intervening generations—of a collation of the substance of the reports at large, according to their topic and with a view to presenting, in a manageable compass, the existing law in its original and authoritative form, but without its original extent and time-consuming adjuncts."